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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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SUMMARY

As a result of a recent decision of the United States Court of Appeals for the District of Columbia Circuit, many carriers that previously have not filed tariffs now will do so.

SBC fully supports the Commission's tentative conclusion that the public interest would be served by streamlining, to the maximum extent consistent with its statutory obligations, all regulation of companies providing services that are subject to competition. SBC disagrees with the Commission, however, that streamlining should or legally can be applied selectively to different companies providing the same service(s). SBC proposes instead that each participant be treated uniformly and relies upon the constitutional guarantee of equal protection. Regardless of its treatment of other industries, however, SBC also submits that separate and compelling reasons inherent in the Communications Act permit streamlined regulation of cellular carriers. The nature of the cellular industry requires the maximum flexibility which is legally permissible.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Tariff Filing Requirements For Nondominant Common Carriers	)	CC Docket No. 93-36

To: The Federal Communications Commission

COMMENTS OF SOUTHWESTERN BELL CORPORATION
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

Southwestern Bell Corporation ("SBC") files these comments, on behalf of its operating subsidiaries, in response to the Commission's Notice of Proposed Rulemaking[1] in the above referenced docket.

I. INTRODUCTION.

The United States Court of Appeals for the District of Columbia Circuit recently invalidated the "forbearance policy," under which the Federal Communications Commission had exempted so-called "nondominant" common carriers from the requirement of Section 203 of the Communications Act that they file tariffs.[2] The Court stated that while it did not quarrel with the purpose underlying the Commission's action, the statute's directive

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[1] Notice of Proposed Rulemaking released February 19, 1993 (hereinafter "NPRM").

[2] 47 U.S.C. § 203. See AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992) (hereinafter "Forbearance Decision").

that all common carriers must file tariffs is mandatory and cannot be waived by the Commission. As a result, many carriers that previously have not filed tariffs now will do

Communications Act permit streamlined regulation of cellular carriers and that the nature of the cellular industry requires the maximum flexibility which is legally permissible.

II. STREAMLINED FEDERAL TARIFFING REQUIREMENTS MUST BE APPLIED EQUALLY TO ALL PROVIDERS OF LIKE SERVICES.

A. The Law Requires Uniform Treatment Of Market Participants.

When the cellular industry emerged in the early 1980s, the FCC faced a unique challenge: How does one ensure that competition flourishes in a new industry segment but still retain oversight responsibility to protect the public interest? The answer the Commission embraced was to license two carriers in each geographic area, one affiliated with a wireline telephone company and the other not. The Commission did NOT handicap the wireline affiliate, however, with a requirement that it file tariffs while allowing the nonaffiliated company to escape tariffing. Rather, the Commission concluded that tariff regulation of both types of companies would be counterproductive because it would tend to slow innovation and allow price signaling. In other words, the entire scheme of regulating this new industry segment, born competitive, was to insist upon equal regulation of all players regardless of their relative market shares, perceived market advantages, etc.

The result of the Commission's minimalist approach to cellular regulation (applied equally to all carriers) has

been an extremely viable business, significant reductions in consumer prices and vast and rapid developments in consumer service options. How ironic, then, that the Commission refuses in this NPRM reviewing the appropriate regulation of so-called "nondominant" carriers that does not extend the results of that "live" market research to other forms of telecommunications. In so doing, the Commission not only ignores the plain results of previous regulatory decisions, it violates clear and unequivocal legal principles. The lesson to be gleaned from the Commissions's experience is that streamlining should be extended equally to all providers of services.

A critical premise for the proposals in the NPRM herein is the observation of the Court in the Forbearance Decision that it had "no quarrel with the Commission's policy objectives," referring to the Commission's decision in a number of prior cases to allow competition to substitute for regulation wherever possible. This conviction, which SBC supports, must be tempered by the statutory limits on the Commission's authority to modify regulatory provisions and by the United States Constitution's guarantees of due process and equal protection under the law (i.e., the Fifth and Fourteenth Amendments).

The Forbearance Decision articulated one statutory limitation on the Commission's authority to modify: A

statutory requirement cannot be "modified" by completely eliminating it. Similarly, the equal protection and due process clauses allow the Commission to liberalize its rules as to what types of tariffs or notice is required, but they do not allow the Commission to apply that favored status only to specific providers of the same service. Equal protection is denied when persons engaged in the same business are subjected to different restrictions or held to different privileges.[5] It is also denied when the law is not equally enforced or is unevenly applied.[6] Thus, the FCC's statutory authority to streamline (or "modify") tariff regulations can be exercised only if such actions are fairly and evenly applied to carriers engaged in similar enterprises. As the United States Supreme Court observed in Yick Wo v. Hopkins, supra:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is . . . within the prohibition of the Constitution. 118 U.S. at 373-374.

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[5] Soon Hing v. Crowley, 113 U.S. 703, 709, 5 S.Ct. 730, 733 (1885).

[6] Yick Wo v. Hopkins, 118 U.S. 356, 6th S.Ct. 1064, 1073 (1886); Garnett v. FCC, 513 F.2d 1056, 1060 (D.C. Cir. 1975).

To the extent that the Commission decides to adopt streamlined regulation for a particular carrier or for the services provided by that carrier, it may do so only so long as that streamlined regulation is applied equally to all providers of the service. In other words, since the Commission proposes to relax tariff filing requirements for some providers of access services and some providers of long distance telecommunications services, its new rules must apply equally to all providers of these services. Fairness and the law demand no less.

B. Commission Policy Supports Uniform Treatment Of Market Participants.

The Commission's articulated rationale for streamlined regulation argues that this treatment should be extended across the board to all providers in an industry.

As the Commission noted in its NPRM, the competitive carrier

of the Communications Act. The Commission's reasoning, however, equally applies to all carriers when competitive entry is permitted. Essentially, the Commission has concluded that alternative sources of supply act as an adequate substitute for tariff regulation. Minimizing burdensome tariff regulation for all carriers in a competitive arena thus serves the public interest and should not be limited to selected members of an industry.

The Commission tentatively concludes in the instant NPRM that technological improvements, and not asymmetrical regulation, have facilitated the development of competition in access facilities and services.[8] SBC agrees. Handicapping incumbent providers is not likely to facilitate continued development of competition, but it is sure to limit further customer choice and all marketplace stimulus for innovation.

The Commission generally noted that significant impediments to competition will exist if any carrier is required to file detailed tariffs burdened by significant regulatory lag. For example, the Commission tentatively concludes as a matter of policy that 14 day (or longer) notice for tariff approval:

> . . . allows competitors time to begin, and possibly complete, development and implementation of the market response before the tariff become effective. As

benefits customers receive from new offerings, and discourages carriers from taking pro-consumer actions.

The Commission offers no rationale for why this same conclusion would not apply to lengthy notice periods for tariffs filed by any provider of a competitive service. Precisely the same results occur in the markets for access or long distance services when Southwestern Bell Telephone Company, for example, files a tariff change to these services. If a one day notice period for any particular provider of access services serves the public interest, it serves the public interest to apply that notice period to all such providers.[9]

Equal protection principles forbid any Commission rule from providing a de legis advantage for some market participants while handicapping another's ability to meet customer's needs. The public interest is not served when one market participant cannot meet a competitor's price due to regulatory fiat.

C. Dominant/Nondominant Carrier Division Does Not Reflect Market Conditions Accurately Or Adequately.

In any event, a hatchet approach that cleaves a particular service into dominant and nondominant providers

is not attuned to the dynamics of the marketplace and thus fails the equal protection test. Market characteristics for specific services are far more accurate than a simple, one-time determination of the "competitiveness" of a particular carrier. SBC suggests that the Commission base its determination of the competitiveness of an industry segment (e.g., access service providers) on (1) the availability of alternative suppliers and (2) the willingness of customers to switch suppliers within the marketplace.[10] Application of this principle is also more likely to survive scrutiny under both the equal protection clause of the Constitution and the statutory limits on the Commission's authority to ease legislative requirements "by general order applicable

streamline tariff regulation of providers of radio services. The regulatory authority construed by AT&T v. FCC is contained in Title II of the Communications Act (47 U.S.C. § 203(b)(2)). In Title III, however, which applies only to radio communications, the Commission is charged with the responsibility to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out the provisions of this chapter" as the public convenience, interest, or necessity require. 47 U.S.C. § 303(g), 303(r). This authority is in addition to the grants of Titles I and II.

Included in this grant of additional authority is the directive of Section 303 that the Commission should "generally encourage the larger and more effective use of radio in the public interest." As such, Section 303 gives the Commission additional authority to make special provisions relating to radio communications under a broad public convenience, interest, or necessity standard.[11] This statutory grant of authority necessarily includes the authority to modify any tariff filing requirements of radio communications services when such action is in the public interest. While in the wake of AT&T v. FCC it is unclear whether this authority goes so far as to exempt the cellular

[11] See, e.g., National Association Of Regulatory Commissioners v. FCC, 525 F.2d 630, 635 (D.C. Cir. 1976).

industry from all tariff filing requirements, it certainly supports the maximum streamlining possible. Since any tariff filing requirement in the radio services market has proven historically to be unnecessary, only the minimum required by Communications Act should be imposed on cellular carriers.

2. Because Cellular Service Is Highly Competitive, Tariff Regulation Is Unwarranted.

Previous Commission determinations support this conclusion. In CC Docket No. 85-89, the Commission decided not to require rate and tariff regulation of public land mobile service licensees. The Commission determined that, given the competitive nature of the radio services market, tariff regulation of such services was "not necessary to assure that [such] communications services are readily available and reasonably priced."[12]

When cellular service was created, the FCC licensed two carriers in each market area, thus ensuring a vigorously competitive arena. The public has been much better served through such competition than it would have been if detailed tariffs and preapproval review had been

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[12] In the Matter of Preemption of State Entry Regulation in the Public Land Mobile Service, 69 RR. 2d (P&F) 1518 (1986), paras. 1 and 33; vacated on state preemption issue, National Association of Regulatory Utility Commissioners v. Federal Communications, No. 86-1205, 1987 U.S. App. Lexis 17810 (D.C. Cir. 1987); Memorandum Opinion and Order, CC Docket No. 85-89 (released October 21, 1987).

required. Absence of rate and tariff regulation has allowed cellular carriers to engage in price competition and competitive bidding, to provide service innovation, and to respond quickly to market trends. The clear beneficiary of this flexibility has been the public. The power of competition in this market should increase with the entry of additional wireless services like Specialized Mobile Radio and Personal Communications services, which can provide much

the Fourth and Fifth Reports of the Competitive Carrier Proceeding conclude that the market position of cellular carriers' interstate services has never been evaluated by the FCC.[15] Therefore, the Commission cannot have "found" them to be dominant, just like the competitive access providers which the Commission treats as nondominant simply because their market power has never been analyzed. The Commission's rules support this conclusion, for the definition in 47 C.F.R. Section 61.3(t) of a nondominant carrier includes one whose status has not been determined. The Commission practice of not burdening cellular companies by requiring tariffs (before the Forbearance Decision) also suggests that the Commission considers cellular carriers nondominant.[16]

C. Streamlining For "Nondominant" Cellular Carriers Is Unnecessary.

In paragraph 13 of the NPRM, the Commission seeks comment on whether any categories of nondominant carriers,

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Petition for Rulemaking; and (3) cellular carriers are appropriate candidates for streamlined regulation regardless of their status as dominant or nondominant.

[15] Competitive Carrier Proceeding, Fifth Report and Order, 98 F.C.C. 2d 1191, 1204 n.41; Fourth Report, 95 F.C.C. 2d 554, para. 409.

[16] Even if the Commission finds that it must determine affirmatively the nondominant status of cellular providers, ample evidence was filed in the Competitive Carrier Proceeding to conclude that all cellular service providers are nondominant. See, e.g., Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 F.C.C. Rcd. 4028, 4029 (1992); Metromobile CTS v. New Vestor Com., 892 F.2d G2, 63 (9th Cir. 1989).

such as nondominant wireless carriers, can and should be regulated differently than nondominant carriers generally. There is no other discussion of separate categories of nondominant carriers elsewhere in the NPRM. Nor is there any indication of the particular wireless carriers to which the Commission refers. With respect to cellular wireless carriers, however, SBC supports maximum streamlined regulation irrespective of its articulated status, as detailed above. Segmenting the wireless industry is unsupported by any record evidence[17] and would create the same legal problems raised by the existing distinction between dominant and nondominant providers of access or long distance.

IV. THE SPECIFIC STREAMLINING PROPOSALS ARE BOTH LAWFUL AND REASONABLE.

A. Each Proposed Change Could Be Lawful If Applied Uniformly To All Service Providers.

Each of the provisions proposed by the FCC in its NPRM and supported by SBC below are consistent with the decision in AT&T v. MCI if they are applied uniformly to all providers of the same service. In that decision, the Court of Appeals merely held that the Commission did not have the authority to exempt carriers from a statutory requirement. In other words, removing a statutory mandate completely was

[17]As the Commission noted in its GEN Docket 90-314, incumbent cellular and new PCS licensees will compete with a variety of telecommunications services (Para 69). There is no distinction to warrant segmentation of this service.

not viewed by the Court of Appeals to be a "modification." The opinion did not call into question, however, the Commission's undoubted authority and discretion to lighten the burden of statutory provisions, an authority which is specifically granted by Section 203(b). The streamlining proposed by the Commission in this proceeding does not negate or remove any of the requirements of the Act, such as notice for filing of rates, but merely specifies how those statutory requirements are to be met.

B. One Day Notice Of Filing Is Permissible.

The Commission solicits comment on its tentative conclusion to allow nondominant carriers to file tariffs on one day's notice. Subject to its earlier comments that all industry members must be treated equally, SBC supports this conclusion.

Under Section 205 of the Communications Act, the Commission retains the ability to police rates even after they have gone into effect. Further, no statute requires the Commission to review or pass judgment upon the reasonableness or validity of rates prior to their effective date. Therefore, it is not necessary for the Commission to require a lengthy notice before the tariffs are effective. The Commission is given express authority in Section 203(b)(2) to modify the notice provision for tariffs and is given permission but not required to hold a hearing before they take effect.

For competitive services, such as cellular and access, lengthy advance notice to one's competitors of proposed rate changes have only anti-competitive effects. Imposing traditional forms of tariff regulation on any provider of these services would have the perverse effect of forcing a carrier to do by regulation what it could not do on its own in the face of the antitrust laws -- pre-announce rate changes to competitors and provide a forum in which competitors may discuss one another's rates. Ironically, BOC providers of access services are required to accede to this type of conduct daily, by the Commission mandate of lengthy notice periods. The Commission specifically noted in the NPRM that the complaint process can be used to rectify problems arising from the proposed truncated review process. That process is available for the tariffs filed by any provider of a service.

C. Banded Rates And Maximum Rates Are Allowed By Law.

The Commission seeks comment on its proposal to limit the type of information required to appear in the tariff to that specifically listed in Section 203(a) of the Act. SBC supports this proposal to the extent that it is applied equally to all carriers of like services. SBC also supports the proposal that providers of competitive services (e.g., cellular or access) be allowed to state their schedule of rates in terms of a maximum rate or range of rates. As with the one-day notice provision, a maximum rate

violates the fundamental constitutional right of equal protection.

Respectfully submitted,

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March 29, 1993

allowance encourages flexibility and enhances a competitor's ability to react quickly to market conditions and consumer demands. Banded rates and maximum rates give adequate notice to consumers and the Commission of prices in order to satisfy themselves that the price is reasonable, thus qualifying as a tariff.

D. Form Requirements.

SBC also supports the Commission's tentative conclusion that detailed form requirements for tariffs are unnecessary, so long as the same requirements are applicable

radio services, the statute specifically directs the Commission to encourage the "larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g). In the past, this Commission has attempted to comply with those mandates by eliminating unnecessary regulatory burdens on limited groups of carriers. The Court of Appeals decision, the Constitution's protection of equal protection and due process, combined with the policy objectives of the Commission for streamlining, will not allow the Commission to achieve this goal by selective application.

Nonetheless, the lesson of AT&T v. FCC allows the Commission to continue on its laudable course to substitute competition for regulation wherever possible by applying streamlined regulation to competitive industries which merit such treatment on an industry-wide basis. SBC strongly supports the Commission's tentative conclusion to do so with regard to cellular service and urges it to extend streamlining to all providers of access services and all providers of long distance services. SBC further urges the Commission not to impede true competition and deny consumers the benefit of full-fledged competition by applying streamlined regulation only to selected providers because it